

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 19, 2007

**MARK MIDGETTE, ET AL. v. METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, ET AL.**

**Appeal from the Circuit Court for Davidson County
Nos. 04C-242, 04C-772 & 04C-2338 Thomas W. Brothers, Judge**

No. M2007-00556-COA-R3-CV - Filed December 20, 2007

This is an appeal of three consolidated lawsuits involving an automobile accident in Davidson County. Following a non-jury trial, the Trial Court found that Chad Lankford, who was driving an ambulance for the Metropolitan Government of Nashville and Davidson County (the “Metropolitan Government”), was 67% at fault for the accident. The Trial Court assigned 33% of the fault to Carolyn Murphy, the driver of the automobile which struck the ambulance. The Metropolitan Government appeals claiming the Trial Court erred when it determined that Chad Lankford was negligent, and it further erred when it assigned 67% of the fault to Lankford. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Sue B. Cain, Deputy Director of Law, Metropolitan Government of Nashville and Davidson County, and Philip D. Baltz and John L. Kennedy, Nashville, Tennessee, for the Appellant, Metropolitan Government of Nashville and Davidson County.

Judy Schechter, Goodlettsville, Tennessee, for the Appellee, Sharonda Lewis.

Thomas Boyers V, Gallatin, Tennessee, for the Appellees, Heidi Wade, and Mark Midgette and Dorothy Lynn Markham, individually and as the natural parents of Kimberly Elizabeth Midgette, deceased.

OPINION

Background

These consolidated lawsuits arise from an automobile accident which occurred in Davidson County on September 21, 2003. On that day, Caroline Murphy (“Murphy”) was driving a vehicle southbound on Gallatin Pike. There were two passengers in the Murphy vehicle, Kimberly Midgette and Heidi Wade. At the same time, an ambulance being driven by Chad Lankford (“Lankford”) was traveling northbound on Gallatin Pike. Lankford is an EMT employed by the Metropolitan Government. Sharonda Lewis was a passenger in the ambulance being transported to a local hospital. As Lankford was in the process of turning left from Gallatin Pike onto Broadmoor Drive, the ambulance was struck by the Murphy vehicle which was proceeding through the intersection of Gallatin Pike and Broadmoor Drive.

Three lawsuits were filed following the accident. Two of the lawsuits were filed by Heidi Wade (“Wade”) and Sharonda Lewis (“Lewis”), who were injured in the accident. The third lawsuit was filed by Mark Midgette and Dorothy Markham, Kimberly Midgette’s parents. Kimberly Midgette died as a result of the injuries she sustained in the accident. All three lawsuits were filed against Murphy and the Metropolitan Government.¹ The Metropolitan Government later cross-claimed against Murphy for the damage to its ambulance. Murphy then filed a cross-claim against the Metropolitan Government seeking damages for her personal injuries and property damage sustained in the accident. All three lawsuits eventually were consolidated for trial.

Agreed orders of compromise and dismissal were entered by Wade, Lewis, and Kimberly Midgette’s parents as to all of their claims against Murphy. In addition, an agreed order of compromise and dismissal was entered into between Murphy and the Metropolitan Government as to the Metropolitan Government’s claim for property damage to its ambulance. The remaining claims left for trial were: (1) the personal injury and/or wrongful death claims against the Metropolitan Government filed by Wade, Lewis, and Kimberly Midgette’s parents; and (2) Murphy’s personal injury and property damage claim against the Metropolitan Government.²

A non-jury trial was conducted in February of 2007. Following the trial, the Trial Court entered final judgments finding and stating that, as to all Plaintiffs:

Defendant Metropolitan Government of Nashville and Davidson County, through the negligence of its employee Chad Lankford, is sixty-seven percent (67%) at fault and that Caroline Murphy is thirty-three percent (33%) at fault for the accident which is the basis for these causes and which occurred on September 21, 2003, and that

¹ All of the lawsuits also named Phyllis Ervin as a defendant. Phyllis Ervin allegedly was the owner of the vehicle being driven by Murphy. All claims against Ervin apparently were dismissed before trial and are not at issue on this appeal.

² At times we will refer collectively to Wade, Lewis, Murphy, and Kimberly Midgette’s parents as “Plaintiffs”.

said negligence is the proximate cause of the injuries suffered by [Plaintiffs].

The Trial Court then awarded Lewis damages of \$7,993.85 for medical expenses and \$17,006.15 for pain and suffering, thereby resulting in damages of \$25,000.00. The Trial Court then reduced that amount by 33%, which represented Murphy's percentage of fault, resulting in a total judgment of \$16,750.00 for Lewis against the Metropolitan Government.

The Trial Court awarded Kimberly Midgette's parents damages of \$663,313.00, which was broken down as follows: (1) \$587,606.00 for loss of earning capacity; (2) \$68,769.00 for medical expenses; and (3) \$6,938.00 for funeral expenses. This amount then was reduced by 33%, resulting in a total judgment for Kimberly Midgette's parents against the Metropolitan Government of approximately \$444,420.00.

The Trial Court awarded Wade damages of \$37,287.00 for medical expenses, \$2,520.00 for lost wages, and an additional \$60,193.00 for pain and suffering. This \$100,000.00 then was reduced by 33%, resulting in a total judgment of \$67,000.00 to Wade against the Metropolitan Government.

Finally, the Trial Court concluded that Murphy's combined damages totaled \$25,000.00. The Trial Court reduced that award by the amount of Murphy's own negligence, i.e., 33%, thereby resulting in a total judgment to Murphy against the Metropolitan Government of \$16,750.00.

The Metropolitan Government appeals the judgments in all of the cases and raises two similar issues for review, which we quote:

- I. Whether the Preponderance of the Evidence Supports the Trial Court's Ruling of Comparative Fault Against the Metropolitan Government of Nashville and Davidson County?
- II. Does the Evidence Preponderate Against the Trial Court's Finding of Fact to the Extent that it Supports Another Finding of Fact with Greater Convincing Effect?

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

At the outset, we note that the Metropolitan Government does not challenge the specific amount of the various damages awarded to Plaintiffs. Rather, the Metropolitan Government challenges both the Trial Court's determination that Lankford was guilty of negligence and the Trial Court's further finding that Lankford was 67% at fault. Because the Metropolitan Government does not challenge the amount of compensatory damages awarded to Plaintiffs, we will limit our discussion of the trial testimony to that testimony describing how the accident allegedly happened. We will not discuss Plaintiffs' evidence pertaining to the extent of their injuries and medical expenses, etc.

The first witness at trial was Joshua Roberts ("Roberts"). Roberts witnessed the accident. Roberts testified that he did not know any of the occupants in the Murphy vehicle or the ambulance. Roberts described the accident as follows:

I was driving in the right lane, far right lane, going towards downtown on Gallatin Road. As we passed over Briley, I noticed that a car was on my tail a little bit. So I got over to the left lane.

The car sped up a little bit, got on the side of me, and they waved at us. I had two other girls in the car with me, one in the passenger seat, and one in the back seat. I slowed down, because I didn't know if they were trying to start trouble, or – or what was going [on], or why they were waving.

But my girlfriend, at the time, [who] was in the passenger seat, said, "Speed up, I think they – I think I know them. They just waved at me." I sped up, and we're coming – we just passed Circle K, and we're coming up to Broadmoor.

And as I'm on the side of them, I look over, and they weren't paying any more attention to us. They were talking to each other, laughing. Any my girlfriend said she didn't know any of them.

So at that time, I seen the driver's eyes light up, you know, like something was happening in front of her. I looked forward, and there was an ambulance turning.

They didn't – I didn't see any – any, you know, sirens, any lights. You know, it – I didn't see anything. I just seen him, and I looked up and seen a green light. I slammed on my brakes, and I hit the [emergency] brake. I start to go sideways. I'm going into the turning lane, or the middle lane.

And she hit her brakes. And when – when I was stopped, I was turned towards the Mexican restaurant in the – in the middle

lane, facing away from Broadmoor. And as I turned around, she had already hit the ambulance, and the car was on fire.

And we jumped out then and – and tried to help them, tried to help get them out. I believe I got the driver out. Destinee and Stephanie, which was the names of the girls that was in my car, they got the back seat – the one girl that was in the back seat out. And the passenger, she – she wasn't moving from the time that I was – the whole time I was there....

Roberts added that his car and the Murphy vehicle were going about the same speed at the time of the collision, and that neither was going faster than the speed limit. Although Roberts could not recall at trial the speed the Murphy vehicle was traveling, he acknowledged giving a statement after the accident to the effect that the Murphy vehicle was traveling about 45 miles per hour. Roberts acknowledged that the oncoming traffic was stopped at the time of the accident. When asked why the oncoming traffic was stopped but the light was green for his vehicle and the Murphy vehicle, Roberts stated "Maybe it's because they had a red light." When Roberts first saw the ambulance, the ambulance was "still pretty much straight" and the driver was "starting to take his turn."

The next witness was Walter Knauf ("Knauf"), an employee of the Metropolitan Government's Public Works Department. According to Knauf, at the intersection where the ambulance was turning left, there would have been at least a three second green turn arrow before the turn signal changed to yellow. The light then would stay yellow for three and one-half seconds before changing to red. Then, after the signal changed to red, there would be a one and one-half second delay before the oncoming traffic light would change to green. Knauf explained that the three second green turn arrow may be as long as eight seconds, depending on the amount of traffic in the turn lane.

John McVey ("McVey") is employed by the Metro Police Department and was the primary investigator for this automobile accident. McVey interviewed Murphy after the accident. Murphy told him that she was driving in the right lane on Gallatin Pike and a car was attempting to pass them. Murphy and the occupants in her car looked over to see who was in the car passing them, and they waved to them. Murphy then looked forward and all of a sudden there was an ambulance right in front of her. Murphy then hit her brakes before making contact with the ambulance.

Wade also testified at trial. According to Wade, she was in the Murphy vehicle along with Kimberly Midgette. Wade stated that they noticed the Roberts vehicle as they were proceeded down Gallatin Pike. Wade testified that the occupants in the Roberts vehicle were staring at them. According to Wade:

So just out of – [we] sarcastically turned ... and me and Kim waved at them. And just not like in a nice way, just like – sarcastic about it, because they were staring.... They dropped back. And once they had dropped back, we had continued driving. And Broadmoor

is like a light up from there.... And once we had got to – I’d say in between the two lights in that area – me and Kim had been talking this entire time.... [Caroline Murphy was not talking] very much [although she would] put her two cents in

So we had come up, and when me and Kim were talking, I had glanced up at the light, just because I was in the back seat, and I just had glanced up, saw a green light, didn’t think anything of it. Turned back, I was talking to Kimberly.

We had said – I just said like one thing to her, and whenever I had looked back straight, I just kind of glanced away from her, and I saw the ambulance straight in front of us. And the only thing that I had time to do in between was close my eyes and clench up ... no sooner than that did we hit the ambulance.

Lewis testified that she had called 911 on the day of the accident because she was having an anxiety attack. An ambulance arrived about five minutes later. Lewis was given oxygen and placed on a stretcher. An EMT was riding in the back of the ambulance with Lewis. Lewis was positioned so that she was facing the back door of the ambulance. According to Lewis:

I felt a bad impact, and I seen that car that blew up.... [T]he man that was back there helping me – we didn’t know what went on, because I didn’t see anything. All we felt was the impact. We heard a lot of screaming. It was raining that night real bad. And we heard a lot of screaming.

And so I seen, through the little window, I seen a car that blew up. So after that, I jerked the IV out of my arm because I was scared, and I had rolled over. That’s when I had hurt myself. And the guy that was in the back with me, he said, “Just calm down. Everything is going to be all right.” And the next thing I knew, they had moved the ambulance.

Murphy was eighteen years old at the time of the accident. Murphy explained that she was driving southbound on Gallatin Pike and that it was dark outside and raining. Murphy then described the following events:

Q. Do you recall where you were when you first saw the vehicle being driven by Joshua Roberts?

A. I was at K-Mart, just passed K-Mart, right before going over the bridge over Briley Parkway.

Q. Okay. And what attracted your attention to the Roberts vehicle?

A. I noticed that they were beside me to my left. And I noticed that they kept – like they'd come up, like right beside us, and then ... they would back up, and then they'd come back up, and back up. And then I kind of just like glanced over, and I could tell – I just felt like, you know, they were staring.

So I asked Kim and Heidi if – you know, why they were staring, and if they knew them, or what was going on, because I didn't know who they were. And they said that they didn't know them. So I was just like, well, oh, well. And I just continued on driving.

Q. All right. Did there come a point when you were no longer aware of the Roberts vehicle?

A. Yes. It was right after we went over the bypass and coming up to what [was the Circle K but which] is now actually the Shell Station to the left-hand side of Gallatin Road....

Q. And how far back is that ... from the point of impact?

A. It was two-tenths of a mile.

Murphy then explained that as she passed the Circle K store, she initially observed that the light at the intersection of Gallatin Pike and Broadmoor was red. Then:

I put my foot on the brake, and like not even a second later it changed green. So I took my foot off the brake and put in on the gas.... I looked over – I checked my driver's side mirror, checked my rear-view mirror, and checked the passenger mirror, and then I looked back and it was just there. I didn't even know it was an ambulance, or what....

Murphy added that she did not like driving in the rain and because of that she was driving very cautiously. Murphy emphasized that the light had changed green as she was approaching the intersection and she slammed on her brakes immediately before the impact. Murphy denied that she never slowed down before entering the intersection. She further denied that the Roberts vehicle caused her to disregard the traffic signal. Murphy added that the ambulance's emergency lights and siren were not on, and she never saw a turn signal.

Lankford is employed by the Nashville Fire Department and was employed in that capacity when the accident occurred. Lankford is an EMT-IV, which is an emergency medical

technician with intravenous therapy certification. On the day of the accident, another EMT, Dean Diggs (“Diggs”), was accompanying Lankford in the ambulance. Lankford testified that they were dispatched to Lewis’ residence. After arriving at the residence and talking with Lewis, they placed Lewis on a stretcher and put her in the ambulance. Diggs “took control of the patient” and Lankford started to drive the ambulance to the hospital. Lankford was headed northbound on Gallatin Pike and was proceeding toward the intersection with Broadmoor. At the intersection of Gallatin Pike and Broadmoor, Lankford pulled into the left-hand turn lane and came to a complete stop. After approximately six or seven seconds, the right light changed to a green arrow. According to Lankford:

Q. Did you see the green arrow when it first changed to – to give you an indication to [turn] left?

A. Yes.

Q. What did you do then?

A. I took my foot off the brake and put it on the accelerator, and proceeded into the intersection with my left turn signal on, and went into the intersection, making my turn onto ... Broadmoor.

Q. How long do you think it took you from the time you saw the green left-turn arrow and the time you felt the collision in that intersection?

A. Eight seconds or so.

Q. As you were stopped at that intersection, and before you initiated your left turn, did you see any other vehicles in that intersection?

A. There may have been vehicles there, but none that would have posed a threat to me making a turn to the left....

Q. Did you ever see the vehicle that impacted the side of your ambulance?

A. No, I did not.

Lankford admitted that he testified at his deposition that it took “at least ten seconds or more to make that turn [onto] Broadmoor.” When asked why he stated at trial that it only took eight seconds, Lankford explained that it was because he took part in a recreation of driving through that intersection.

Diggs also was a witness. Diggs testified that he was taking Lewis' blood pressure immediately before the accident. Diggs had finished taking Lewis' blood pressure when the ambulance started moving. The impact occurred after the ambulance had been moving for three to five seconds.

The final witness was Todd Hutchison ("Hutchison"). Hutchison is employed by VCE Incorporated, a forensic investigative and engineering services company located in Nashville. Hutchison performed an accident reconstruction approximately two years after the collision at issue in this case. After discussing his reconstruction of the accident and other information that he relied upon to reach his conclusion, Hutchison stated:

Then in summary, based on the above and its conclusions, the driver of the ambulance, Chad Lankford, stopped at the intersection, and when the light changed, giving him a left green arrow, after looking and not seeing anything that posed a threat, he proceeded to make a slow left turn and was in the process of the turn, and had established control of the intersection when the accident occurred.

It was also concluded that the driver of the Honda, Caroline Murphy, by her own admission, took her eyes off of the roadway at a critical point, as she approached the intersection, and when she looked back, [she] did not have enough time to avoid the accident.

The vehicle or vehicles to the left of ... the Murphy vehicle were able to see the ambulance and to stop in time to avoid impacting into it.

On cross-examination, Hutchison essentially acknowledged that his conclusion was consistent primarily with Lankford's testimony, and was contrary to the testimony of all the available witnesses in the Murphy vehicle as well as the Roberts vehicle. Specifically, Hutchison acknowledged that five witnesses stated that the light was green when the Murphy vehicle entered the intersection, and several of those witnesses also testified that the ambulance did not have a turn signal on. Hutchison was further questioned as follows:

Q. If the ambulance on the night of the accident had been in the turn lane and had been distracted, the driver distracted, Mr. Lankford, for whatever reason, wasn't paying attention, and he looks up and sees it's green, and right as he begins to start and [the green turn arrow has] already been extended to its maximum time, and he starts to pull out and it turns yellow as he's beginning to turn, there would be no additional extension once it had turned yellow, would there?

A. Correct. And he – he could have been in the intersection at some point at the eight seconds and already been in the intersection starting on the green, and then it's turning yellow while at that time

he's in the process of making his turn, and ... the light could have changed before that. And that's how I could reconcile in my mind the statements of everybody saying it was green for a short time prior to the impact.

Q. So you believe that the light was in fact green?

A. I – I don't know what the light was. I know what it – I know that it could have been red for the – for the, you know, southbound traffic, and it could have been green for the southbound traffic.

The turn test that I did, and all the testimony in terms of starting out from the turn lane, as Mr. Lankford said, upon seeing the light turn green, and the test that I did would suggest that it was red for the southbound lane. The statements of the other people would be contrary to that.

Following the trial, the Trial Court announced its factual findings from the bench. The Trial Court first found that Roberts and the passengers in his vehicle had no fault in causing the accident. The Trial Court then stated that the "most likely scenario" was that Lankford started making the left-hand turn "right before the yellow arrow came on," and because he was making the turn, he would not have seen it turn yellow. The Trial Court added:

I can't find a good explanation for why [Mr. Lankford] couldn't see not one, but two vehicles coming down the road in both lanes of oncoming traffic when you're sitting at a stoplight for six to seven seconds....

I am persuaded by Mr. Roberts' testimony that he did go into a panic slide and the car slid right off the edge of the intersection when confronted with the ambulance turning in front of him.... I think the proof has shown by a preponderance of the evidence that the light did turn green for the southbound traffic, once Mr. Lankford had already entered into the intersection.

The Trial Court then found that Lankford was presented with an immediate hazard that he should have been aware of, i.e., that a collision would occur if he proceeded to make the left-hand turn. Specifically:

Here, Mr. Lankford just, for whatever reason, ... didn't see the [Murphy and Roberts] cars, or can't remember, perhaps.

And all of us are trained as drivers to know when you're watching oncoming traffic, if you don't see cars slowing down as they approach an intersection, you don't turn left in front of them....

When you turn left across traffic, you are taking the most dangerous maneuver, as opposed to someone who is simply going straight through an intersection....

The Trial Court then found that Murphy also was being inattentive in her driving. According to the Trial Court, Murphy was being inattentive in not seeing what was there to be seen, “which is a 24-foot long ambulance turning in front of her.” As stated previously, the Trial Court ultimately apportioned liability with Lankford being 67% at fault, and Murphy being 33% at fault.

On appeal, the Metropolitan Government initially claims that because the Trial Court did not incorporate its findings announced after trial into the final judgments, those findings cannot be considered by this Court. We disagree. The oral pronouncement of the Trial Court was transcribed and included in the transcript on appeal and is as much a part of the record as the testimony of the various witnesses. Therefore, we will consider the factual findings of the Trial Court announced after the trial and accord those findings the proper weight on appeal.

The Trial Court certainly was confronted with conflicting testimony as to how the accident happened and who was at fault. In determining whether the evidence preponderates against the Trial Court’s findings, we begin by addressing the only explicit credibility determination made by the Trial Court. Specifically, the Trial Court expressly credited the testimony of Roberts that the light had changed to green before the accident happened. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

Since there is no clear and convincing evidence to the contrary, we must accept the Trial Court’s credibility determination and the factual findings flowing from that determination. This leads us to the inevitable conclusion that the facts do not preponderate against the Trial Court’s finding that Lankford was 67% at fault. There is ample proof in the record that, for whatever reason, Lankford did not timely make the left hand turn onto Broadmoor and was in the process of making

that turn when the light changed green for the oncoming traffic proceeding southbound on Gallatin Pike. This conclusion is supported by all of the eye witness testimony, except Lankford's. In order to alter the judgment in the manner suggested by the Metropolitan Government, we would have to conclude that the Trial Court erroneously credited the testimony of Roberts, Murphy, and Wade, and erroneously failed to accept all of the testimony of Lankford. We decline such an invitation, and conclude that the facts do not preponderate against the Trial Court's findings and ultimate conclusion that Lankford was 67% at fault for the accident, and that Murphy was 33% at fault.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, the Metropolitan Government of Nashville and Davidson County.

D. MICHAEL SWINEY, JUDGE